

No. 10519

United States
Circuit Court of Appeals
For the Ninth Circuit.

NATHANIEL WINSTON HENDERSON,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

DEC 29 1943

PAUL P. O'BRIEN,
CLERK

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NATHANIEL WINSTON HENDERSON,
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NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

AMES PETERSON

WILLIAM B. BEIRNE

925 L. A. Stock Exchange Bldg.

Los Angeles, Calif.

For Appellee:

CHARLES H. CARR, United States Attorney,

V. P. LUCAS, Assistant United States Attorney

600 U. S. Post Office and Court House Bldg.

Los Angeles 12, Calif. [1*]

No. 16044

United States District Court, Southern District of
California, Central Division

THE UNITED STATES OF AMERICA

vs.

N. WINSTON HENDERSON

INDICTMENT

Viol.: 18 USC 100—Theft of Government Property.

In the Name and by the Authority of the United States of America, the Grand Jury for the Southern District of California, at Los Angeles, presents on oath in open Court:

That

N. WINSTON HENDERSON,

hereinafter called the defendant, on or about June 2, 1943, at Los Angeles, Los Angeles County, California, was a duly appointed, qualified and acting Chairman of War Price and Rationing Board No. 5-48, said board being then and there a War Price and Rationing Board set up by the Office of Price Administration, an agency of the United States;

That on or about the said 2nd day of June, 1943, at Los Angeles, Los Angeles County, California, aforesaid, the defendant did knowingly, wilfully, unlawfully and feloniously embezzle certain property of the United States, to-wit: 250 "A" gasoline rationing coupons, a more particular description of

which said property is to the grand jurors unknown, and which said property had on said date come into the possession of said defendant in the regular course of his official duty as said Chairman of said War Price and Rationing Board as aforesaid, said defendant then and there well knowing said property to be property of the United States;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [2]

COUNT TWO

And the Grand Jury aforesaid, upon their oath aforesaid, do further present:

That

N. WINSTON HENDERSON,

hereinafter called the defendant, on or about June 2, 1943, at Los Angeles, Los Angeles County, California, did knowingly, wilfully, unlawfully and feloniously steal and purloin certain property of the United States, to-wit: 250 "A" gasoline rationing coupons, a more particular description of which said property is to the grand jurors unknown; the said defendant then and there well knowing said property to be the property of the United States;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

CHARLES H. CARR

United States Attorney

A true bill,

D. BLAINE MORGAN
Foreman.

Bail, \$3000.

[Endorsed]: Filed June 9, 1943. [3]

At a stated term, to-wit: The February Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 21st day of June in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable: Campbell E. Beaumont, District Judge.

No. 16,044—Crim.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

N. WINSTON HENDERSON,

Defendant.

PLEA OF NOT GUILTY

This cause coming on for arraignment and plea of the defendant N. Winston Henderson; Rollin F. Duni, Esq., Assistant U. S. Attorney, appearing for the Government; Ezra E. Stern, Esq., appearing as counsel for the defendant; Wm. Herrick, Court Re-

porter, being present and reporting the proceedings; the defendant, being present in Court on bond, now states his true name to be Nathaniel Winston Henderson, waives the reading of the Indictment, and enters plea of not guilty to both counts of the Indictment.

It is ordered that this cause be, and it hereby is, set for trial for July 13, 1943, at 10 A. M. before a Jury, and that a Jury be ordered for the trial of this case.

34/134 [5]

[Title of District Court and Cause.]

PETITION TO SUPPRESS EVIDENCE AND
TO DIRECT THE RETURN THEREOF TO
THE DEFENDANT

Comes now, N. Winston Henderson, defendant herein, and respectfully represents:

I.

That heretofore, and on or about June 2, 1943, at about the hour of 10:00 o'clock a. m., on West Adams Boulevard, at a point about 100 feet easterly of Kenwood Avenue, in Los Angeles, California, he was unlawfully and illegally arrested by one Jack Foster and two other persons, whose names are to petitioner unknown, but all of whom represented themselves to be investigators for the Office of Price Administration, and employed by the United States Government, and said three last named persons

against the will, wishes, and consent, and over the protest, and in violation of the constitutional rights of petitioner as secured to him under the Fourth and Fifth Amendments to the Constitution of the United States, searched petitioner and his Cadillac automobile, bearing [6] California License No. 01A-574, and as the result of such search seized and kept in their possession \$30.00 in United States currency belonging to petitioner, which said sum of \$30.00 is still retained by the three persons named.

II.

That at the time of the arrest of the petitioner, no warrant of arrest was exhibited to, or read to petitioner, nor was any search warrant exhibited to petitioner, nor was any statement made by the said Foster and the other persons with him, that the search of petitioner's person or of his automobile was being made under authority of any search warrant, nor was any crime, either felony or misdemeanor, either as charged in the indictment, or otherwise, or at all, committed by petitioner in the presence of the said Foster or the other persons with him at the time of such search and seizure.

III.

That as the said Foster and the other persons with him approached petitioner, the said Foster stated: "What are you fellows doing here; we are going to look you over"; and thereupon the said Foster exhibited to petitioner his, Foster's, official identification card, and thrust his hand into the left

side trouser pocket of petitioner and extracted therefrom the \$30.00 in currency above-mentioned, and one of the other men with the said Foster reached into the pocket of one Murray, who was at that time in the Cadillac automobile of petitioner and extracted something from the said Murray's pocket; that thereafter, and at no time prior thereto, the said Foster stated: "We are going to take you along," and no statement or suggestion was theretofore made by the said Foster or by either of those men with him that petitioner was under arrest.

IV.

That the said search above-mentioned occurred opposite [7] No. 1642 West Adams Boulevard, Los Angeles, California, which property petitioner now owns and has owned continuously for more than six years last past, and which consists of a two-story store and apartment building, and to which property petitioner makes frequent trips and not less often than an average of ten times a month; that petitioner now resides, and for more than one year last past has resided, with his family at his property at 5502 Rimpau Boulevard, Los Angeles, California; that ever since the establishment in Los Angeles of War Price and Rationing Boards, petitioner has been a member of Board No. 5-48, and for more than one year prior to, and up to the date of the search above mentioned, petitioner has been Chairman of such Board, he having served on that Board almost daily.

Wherefore, petitioner prays that the property so seized be excluded as offered in evidence at the trial of this cause, and that such property be suppressed and the whole thereof be forthwith returned to the petitioner, or to his order.

N. WINSTON HENDERSON

Defendant and Petitioner

AMES PETERSON and

DAVID H. CANNON

By DAVID H. CANNON

Attorneys for Defendant

and Petitioner. [8]

I, David H. Cannon, one of the attorneys for the defendant herein, do hereby certify that the above and foregoing Petition to Suppress Evidence, etc., is made in good faith, and not for the purpose of delay, and, in my opinion, is well taken in law.

Dated: July 7, 1943.

DAVID H. CANNON [9]

State of California

County of Los Angeles—ss

H. Winston Henderson, being by me first duly sworn deposes and says: That he is the Defendant and Petitioner in the above entitled matter; that he has read the foregoing Petition to Suppress Evidence and to Direct the Return Thereof to the Defendant and knows the contents thereof; and that the same is true of his own knowledge except as to the matters and things therein stated on his infor-

mation or belief, and that as to those matters and things he believes to be true.

H. WINSTON HENDERSON

Subscribed and Sworn to before me this 8th day of July 1943.

[Seal] DOROTHY BUTLER

Notary Public in and for the County of Los Angeles
State of California [10]

POINTS AND AUTHORITIES IN SUPPORT
OF MOTION TO SUPPRESS EVIDENCE
AND TO DIRECT THE RETURN THERE-
OF TO THE DEFENDANT

Evidence of any character secured in violation of the Fourth and Fifth Amendments to the Constitution of the United States cannot be used over the objection of the defendant; it is the duty of the Court to suppress such evidence and to direct the return of the seized property to the person or persons from whom it was taken.

United States vs. Abrams,
230 Fed. 313;

Agnello vs. United States,
269 U.S. 20;
70 L. Ed. 145;

United States vs. Wong,
94 Fed. 832;

Weeks vs. United States,
232 U.S. 383;
58 L. Ed. 652;

Boyd vs. United States,
116 U.S. 616;
29 L. Ed. 746.

The compulsory seizing of this money from the person of the defendant "may be likened to a confession, which is incompetent because not voluntarily made."

United States vs. Abrams, *supra*.

Bram vs. United States,
168 U.S. 532;
42 L. Ed. 568.

[Endorsed]: Filed July 8, 1943. [11]

At a stated term, to-wit: The September Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday the 13th day of July in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable: Campbell E. Beaumont, District Judge.

[Title of Cause.]

No. 16,044-B Crim.

This cause coming on for jury trial; Maurice Norcop, Esq., Assistant U. S. Attorney, appearing for the Government; Ames Peterson and David H. Cannon, Esqs., appearing as counsel for the defend-

ant; A. H. Bargion and Samuel Goldstein, Court Reporters, being present and reporting the proceedings; the defendant being present in Court:

It is ordered that the motion of defendant to suppress evidence, etc., heretofore heard, is denied and exception noted.

Both sides being ready, it is now ordered that a jury be impaneled for the trial of this cause, whereupon the Clerk draws the names of the following twelve jurors, who take their seats in the jury box:

1. J. A. Masterson
2. D. C. Wright
3. F. H. Bartlett
4. Omar E. Boyd
5. Herman R. Brier
6. Alan H. De La Mare
7. Fred J. Brown
8. Ralph G. Johns
9. Ben Cottle
10. Thos. A. Gould
11. W. A. Burke
12. R. B. Dickinson

The jurors are examined for cause, and Fred J. Brown is excused for cause; it is ordered that one more name be drawn, and the name of Raymond Zens is drawn; examined for cause and passed for cause.

The jurors now in the box are passed for cause, and F. H. Bartlett is excused by defendant on peremptory challenge; it is ordered that one more

name be drawn, and the name of Herbert H. Culling is drawn; examined for cause and passed for cause.

W. A. Burke is excused by plaintiff on peremptory challenge; it is ordered that one more name be drawn, and the name of Edward M. Clogg is drawn; examined for cause and excused for cause. It is ordered that one more name be drawn, and the name of Walter B. Brown is drawn; examined for cause and passed for cause. [12]

Walter B. Brown is excused by defendant on peremptory challenge; it is ordered that one more name be drawn, and the name of Ralph O. Chick is drawn; examined for cause and passed for cause.

R. B. Dickinson is excused by defendant on peremptory challenge; it is ordered that one more name be drawn, and the name of Harry Wine is drawn; examined for cause and passed for cause.

Harry Wine is excused by plaintiff on peremptory challenge; it is ordered that one more name be drawn, and the name of Joseph A. Conaty is drawn; examined for cause and passed for cause.

Herbert H. Culling is excused by defendant on peremptory challenge; it is ordered that one more name be drawn, and the name of Nelson W. Cowles is drawn; examined for cause and passed for cause.

Ralph G. Johns is excused by defendant on peremptory challenge; it is ordered that one more name be drawn, and the name of Julius Wohl is drawn; examined for cause and passed for cause.

Julius Wohl is excused by plaintiff on peremptory challenge; it is ordered that one more name be

drawn, and the name of Jefferson W. Asher is drawn; examined for cause and passed for cause.

Herman R. Brier is excused by defendant on peremptory challenge; it is ordered that one more name be drawn, and the name of G. T. Edmondson is drawn; examined for cause and passed for cause.

G. T. Edmondson is excused by defendant on peremptory challenge; it is ordered that one more name be drawn, and the name of Albert F. Bolz is drawn; examined for cause and passed for cause.

At 11 o'clock A. M. the Court admonishes the jurors that during the progress of this trial and the recesses therein, they are not to speak to anyone, or permit anyone to speak to them about this cause or any matter or thing therewith connected; that until said cause is finally submitted to them for their deliberation under the instructions of the Court, they are not to speak to each other about this cause or any matter or thing therewith connected, or form or express any opinion concerning the merits of the trial until it is finally submitted to them, and declares a recess. [13]

Court reconvenes herein at 11:25 A. M.; all present as before; the jurors in the box and the defendant are present; it is ordered that this cause be, and it hereby is, continued to 3 P. M.; the jurors are reminded of the admonition heretofore given, and Court recesses at 11:35 A. M.

Court reconvenes at 3 P. M.; all present as before; the jurors in the box and the defendant are present.

Jefferson W. Asher is excused by plaintiff on peremptory challenge; it is ordered that one more name be drawn, and the name of Edward McWilliams is drawn; examined for cause and passed for cause.

Albert F. Bolz is excused by defendant on peremptory challenge; it is ordered that one more name be drawn, and the name of James Loudon is drawn; examined for cause and passed for cause.

James Loudon is excused by defendant on peremptory challenge; is is ordered that one more name be drawn, and the name of H. J. Stevenson is drawn; examined for cause and passed for cause.

There being no further challenges, the jurors now in the box are accepted and sworn as the jury for the trial of this cause, viz:

THE JURY

1. J. A. Masterson
2. D. C. Wright
3. Nelson W. Cowles
4. Omar E. Boyd
5. H. J. Stevenson
6. Alan H. DeLaMare
7. Raymond Zens
8. Edw. McWilliams
9. Ben Cottle
10. Thos. A. Gould
11. Ralph O. Chick
12. Joseph A. Conaty

The remaining jurors not impaneled are excused to July 16, 1943, at 10 A. M.

The Clerk reads the indictment to the jury.

At 3:40 P. M. the Court reminds the jury of the admonition heretofore given, and declares a recess.

Court reconvenes at 3:55 P. M.; all present as before; the defendant and jury are present, and counsel so stipulate.

Attorney Peterson moves for exclusion of witnesses, and it is so ordered as to all witnesses except John E. Foster.

Witnesses R. W. Smith, J. P. Murray, Marie A. Stabler, J. H. Taylor, John E. Foster, Fred E. Yerger, and Grace S. Kingon, are sworn, and said witnesses leave the Courtroom except John E. Foster and Grace S. Kingon. [14]

Grace S. Kingon is called and testifies for the Government.

Government's Exhibit No. 1 is received in evidence, and Government's Exhibit No. 2 is marked for identification.

At 4:50 P. M. the Court reminds the jury of the admonition heretofore given, and orders the further trial of this cause continued to July 14, 1943, at 9:30 A. M., and Court adjourns.

34/468-471 [14-A]

At a stated term, to-wit: The February Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Wednesday the 14th day of July in the

year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable Campbell E. Beaumont,
District Judge.

[Title of Cause.]

No. 16,044-B Crim.

This cause coming on for further jury trial; Maurice Norcop, Esq., Assistant U. S. Attorney, appearing for the Government; Ames Peterson and David H. Cannon, Esqs., appearing as counsel for defendant; A. H. Bargion and Samuel Goldstein, Court Reporters, being present and reporting the proceedings; the jury and defendant are present, and it is so stipulated.

Grace S. Kingon continues testimony.

Fred E. Yerger, heretofore sworn, testifies for the Government.

Government's Exhibits Nos. 3, 5 and 6 are received in evidence, and No. 4 is marked for Identification.

Government's Exhibits Nos. 2 and 4, heretofore marked for Identification, are received in evidence.

Defendant's Exhibit A is received in evidence.

At 10:30 A. M. the Court reminds the jury of the admonition heretofore given, and declares a recess; reconvenes at 10:45 A. M.; all present as before, including the defendant, and the jury is absent.

Counsel argue re admissibility of evidence.

At 11:10 A. M. the jury returns into Court; all

present as before; the defendant and jury are present, and counsel so stipulate.

James P. Murray, heretofore sworn, testifies for the Government.

Government's Exhibit No. 7 is marked for Identification.

Government's Exhibit No. 8 is received in evidence.

At 12 o'clock noon the Court reminds the jury of the admonition heretofore given, and recesses to 2 P. M.

Court reconvenes at 2 P. M.; all present as before; the defendant and jury are present, and counsel so stipulate. [15]

James P. Murray continues testimony.

Government's Exhibits Nos. 9, 10 and 11, and Defendant's Exhibit B are received in evidence.

Orville Lloyd Sargent is called, sworn, and testifies for the Government.

At 3 P. M. the Court reminds the jury of the admonition heretofore given, and declares a recess; reconvenes herein at 3:40 P. M.; all present as before; the defendant and jury are present, and counsel so stipulate.

Witness Sargent continues testimony.

At 3:45 P. M. the Court reminds the jury of the admonition heretofore given, and excuses the jury and they retire, and in the absence of the jury counsel argue re admissibility of testimony, and the Court strikes certain testimony of the witness Sargent.

At 4 P. M. the jury returns into Court; all pres-

ent as before; the defendant and jury are present, and counsel so stipulate.

Witness Sargent continues testimony.

Marshall E. McFarland is called, sworn, and testifies for the Government.

Government's Exhibit No. 12 is marked for Identification, and No. 13 is received in evidence.

Richard W. Smith is called, sworn, and testifies for the Government.

Jona H. Taylor is called, sworn, and testifies for the Government.

Government's Exhibit No. 14 is received in evidence.

At 5 P. M. the Court reminds the jury of the admonition heretofore given, and orders the further trial of this cause continued to 10 A. M. July 15, 1943.

34/498-499 [16]

At a stated term, to-wit: The February Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Thursday the 15th day of July in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable: Campbell E. Beaumont,
District Judge.

[Title of Cause.]

No. 16,044-B Crim.

This cause coming on for further jury trial; Maurice Norcop, Esq., Assistant U. S. Attorney, appearing for the Government; Ames Peterson and David H. Cannon, Esqs., appearing as counsel for the defendant; F. M. Harvey and Samuel Goldstein, Court Reporters, being present and reporting the proceedings; the defendant and jury are present, and counsel so stipulate.

John E. Foster, heretofore sworn, testifies for the Government.

Government's Exhibit No. 15 is received in evidence.

Defendant's Exhibit C is marked for Identification, and Defendant's Exhibits D and E are received in evidence.

At 11:05 A. M. the Court reminds the jury of the admonition heretofore given, and declares a recess; reconvenes at 11:20 A. M.; all present as before; the defendant and jury are present, and counsel so stipulate.

Witness Foster continues testimony.

Defendant's Exhibits F and C, and Government's Exhibit No. 16, are received in evidence.

Minnie Smith is called, sworn, and testifies for the Government.

At 12 o'clock noon the Court reminds the jury of the admonition heretofore given, and declares a recess to 1:30 P. M.

Court reconvenes at 1:35 P. M.; all present as before; the defendant and jury are present, and counsel so stipulate.

The Court excuses the jury and they retire.

In the absence of the jury, counsel argue re admissibility of certain evidence.

Court recesses at 2:40 P. M. and reconvenes at 2:50 P. M.; all [17] present as before; the defendants and jury are present, and counsel so stipulate.

The Government rests.

Attorney Cannon moves for suppression of Government's Exhibit No. 9 and moves for directed verdict of not guilty on both counts of the indictment. The Court denies said motions.

Murray Armstrong is called, sworn, and testifies for defendant.

Sidney Redpath, Kenneth A. MacIntyre, Robert I. Stillwell, and Edward F. Herzog are called, sworn, and testify for defendant.

Both sides rest.

Attorney Peterson renews motion for directed verdict of not guilty on both counts, and the Court denies the motion.

At 3:05 P. M. Attorney Norcop argues to the jury on behalf of the Government.

At 3:25 P. M. the Court reminds the jury of the admonition heretofore given, and orders this cause continued to July 16, 1943, at 9:30 A. M. for further trial.

34/516-518 [18]

At a stated term, to-wit: The February Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Di-

vision of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday the 16th day of July in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable: Campbell E. Beaumont,
District Judge.

[Title of Cause.]

No. 16,044-B Crim.

This cause coming on for further jury trial; Maurice Norcop, Esq., Assistant U. S. Attorney, appearing for the Government; Ames Peterson and David H. Cannon, Esqs., appearing as counsel for the defendant; F. M. Harvey, Court Reporter, being present and reporting the proceedings; the defendant and jury are present, and counsel so stipulate; it is ordered that trial proceed.

Attorney Norcop moves to dismiss count 2 of the indictment, and Attorneys Cannon and Peterson consent thereto, and count 2 is ordered dismissed.

Attorney Peterson argues to the jury on behalf of the defendant at 9:37 A. M.

Attorney Cannon argues to the jury on behalf of the defendant at 9:48 A. M.

Attorney Norcop argues to the jury on behalf of the Government in closing.

At 10:35 A. M. the jury is reminded by the Court of its admonition heretofore given, and the Court declares a recess.

At 10:55 A. M. Court reconvenes; all present as before; the defendant and jury are present, and counsel so stipulate.

The Court instructs the jury on the law of the case.

Attorney Cannon excepts to jury instructions given and not given.

G. C. Welch and Wendell Davis, bailiffs, are sworn as the officers to care for the jury.

At 11:15 A. M. the jury is given form of verdict and retires to consider its verdict, and the Court recesses to await the return of the jury. [19]

Court reconvenes at 12:20 P. M.; all present as before; the defendant and jury are present, and counsel so stipulate.

In response to the Court's inquiry, the foreman states that the jury has agreed upon a verdict; whereupon, pursuant to the Court's order, the verdict is presented and read by the Clerk. The jury is polled, and each juror states that verdict of guilty is his verdict; whereupon, the verdict is ordered filed and entered, said verdict being as follows:

[Title of District Court and Cause.]

VERDICT

We, the Jury in the above entitled case, find the defendant Nathaniel Winston Henderson, Guilty as charged in the first count of the indictment.

Dated: Los Angeles, California, July 16, 1943.

O. E. BOYD,

Foreman of the Jury.

[Endorsed]: Filed Jul. 16, 1943. Edmund L. Smith, Clerk. By R. B. Clifton, Deputy Clerk.

The jury is ordered discharged from the case and excused until notified.

It is further ordered that this cause be, and it hereby is, continued to July 24, 1943, at 10 A. M. for sentence.

Attorney Peterson moves that the defendant be continued on present bond until time of sentence; Attorney Norcop consents thereto, and it is so ordered.

Court adjourns at 12:35 P. M.

34/533-535 [20]

At a stated term, to-wit: The February Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday the 6th day of August, in the year of our Lord one thousand nine hundred and forty-three.

Present the Honorable Campbell E. Beaumont District Judge.

[Title of Cause.]

No. 16,044-B Crim.

REPORT OF PROBATION OFFICER

This cause coming on for hearing on report of the Probation Officer and sentence of the defendant Nathaniel Winston Henderson on count 1 of the indictment herein; Maurice Norcop, Esq., Assistant U. S. Attorney, appearing for the Govern-

ment; Ames Peterson and David H. Cannon, Esqs., appearing as counsel for the defendant; Ross Reynolds, Court Reporter, being present and reporting the proceedings; the defendant being present in Court on bond.

Attorney Peterson states there is no legal cause why sentence should not be pronounced at this time, and argues for leniency.

The Court pronounces judgment against the defendant as follows:

* * * * *

Attorney Peterson moves the Court to fix bond on appeal and argues. The Court fixes bond on appeal at \$10,000.00 and orders defendant remanded to custody.

34/881-883 [21]

District Court of the United States
Southern District of California, Central Division
UNITED STATES

v.

NATHANIEL WINSTON HENDERSON

No. 16044 Criminal Indictment in two counts
for violation of U.S.C. Title 18 Secs. 100

JUDGMENT AND COMMITMENT

On this 6th day of August, 1943, came the United States Attorney, and the defendant Nathan-

iel Winston Henderson appearing in proper person, and by Amos Peterson and David H. Cannon, Esqs., his attorneys, and

The defendant having been convicted on jury verdict of guilty on count 1 of the offenses charged in the indictment in the above-entitled cause, to wit: embezzlement of government property

and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is By the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of five (5) years.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) C. E. BEAUMONT,
United States District Judge.

[Endorsed]: Filed Aug. 6, 1943. [22]

[Title of District Court and Cause.]

NOTICE OF APPEAL

The name and address of appellant is N. Wins-

ton Henderson, 5502 Rimpau Boulevard, Los Angeles, California.

The names and addresses of appellant's attorneys are,—Ames Peterson, Esq., 639 South Spring Street, Los Angeles—14, California, and David H. Cannon, Esq., 650 South Spring Street, Los Angeles—14, California.

The offense was a violation of 18 U.S.C. 100— theft of government property.

The date of judgment was August 6, 1943. A brief description of the judgment is 5 years in the Federal Penitentiary. Appellant is now on bail.

I, the above-named appellant, hereby appeal to the United States Circuit Court of Appeal for the Ninth Circuit [23] from the judgment above mentioned on the grounds set forth below.

N. WINSTON HENDERSON
Appellant

Dated: Aug. 6, 1943.

GROUND OF APPEAL

I.

That said verdict and finding of guilt is contrary to the evidence adduced at the trial of said cause.

II.

That the evidence adduced at the trial is insufficient to justify said verdict and finding of guilt.

III.

Errors of the Court in admission of testimony

offered by the United States of America in evidence against this defendant.

IV.

That the trial judge erred in his rulings on the questions of law and fact.

V.

That the court erred in admitting into evidence and permitting to be considered by the jury evidence tending to show the commission of offenses other than those set forth in the indictment upon which the defendant was tried.

AMES PETERSON

DAVID H. CANNON

Attorneys for Appellant.

[Endorsed]: Filed Aug. 6, 1943. [24]

[Title of District Court and Cause.]

BAIL BOND ON APPEAL.

Bond No. 824-0015

Know All Men By These Presents:

That we, N. Winston Henderson as Principal, and the Northwest Casualty Company, a Washington Corporation, a surety, are jointly and severally held firmly bound unto the United States of America in the sum of Ten Thousand (\$10,000.00) Dollars, for the payment of which sum we and each of us bind ourselves, our heirs, executors, administrators and assigns.

The condition of the foregoing obligation is as follows:

Whereas, lately, to-wit, on the 6th day of August, 1943, at a term of the District Court of the United States, in and for the Southern District of California, Central Division, in an action pending in said Court in which the United States of America is Plaintiff, and N. Winston Henderson was Defendant, judgment and sentence were made, given, rendered and entered against the said Defendant in the above-entitled action, whereas he was convicted as charged in the indictment;

Whereas, in said judgment and sentence, so made, given, rendered and entered against said N. Winston Henderson, it was ordered and adjudged that the defendant, having been found guilty of said offense, is hereby committed to the custody of the Attorney General for imprisonment in an institution of the Penitentiary Type, to be designated by the Attorney General or his Authorized representative for a period of Five years.

Whereas, the said N. Winston Henderson, has filed notice of appeal from the said conviction and from the said judgment and sentence appealing to the United States Circuit Court of Appeals for the Ninth Circuit; and

Whereas, the said N. Winston Henderson, has been [25] admitted to bail pending the decision upon said appeal, in the sum of Ten Thousand (\$10,000.00) Dollars.

Now Therefore, the conditions of this obligation are such that if said N. Winston Henderson shall

appear in person, or by his attorney, in the United States Circuit Court of Appeals for the Ninth Circuit on such day or days as may be appointed for the hearing of said cause in said Court and prosecute his appeal; and if the said N. Winston Henderson shall abide by and obey Court orders by the said United States Circuit Court of Appeals for the Ninth Circuit, and if the said N. Winston Henderson shall surrender himself in execution of said judgment and sentence, if the said judgment and sentence be affirmed by the United States Circuit Court of Appeals for the Ninth Circuit; and if the said N. Winston Henderson will appear for trial in the District Court of the United States, in and for the Southern District of California, Central Division, on such day or days as may be appointed for retrial by said District Court, and if the said judgment and sentence against him be reversed, then this obligation shall be null and void; otherwise to remain in full force and effect.

This Recognizance shall be deemed and construed to contain the "express agreement", summary judgment and execution thereon, mentioned in Rule 13 of the District Court.

N. W. HENDERSON

Principal

5502 Rimpau Bl.

Address

NORTHWEST C A S U A L T Y
COMPANY, a Washington
Corporation.

[Seal] By A. W. APPEL
A. W. APPEL, Its Attorney-
in-Fact
Surety.

Approved as to Form

CHARLES H. CARR
By JAMES M. CARTER
United States Attorney

I hereby certify that I have examined the within bond and that in my opinion the form thereof is correct and surety thereon is qualified.

AMES PETERSON
Attorney for Defendant and
Appellant.

The foregoing bond is approved this 6th day of August, 1943.

C. E. BEAUMONT,
United States District Judge

State of California,
County of Los Angeles.—ss.

On this 6th day of August, A. D. 1943, before me, Marva Weede, a Notary Public in and for the County and State aforesaid, duly commissioned and sworn, personally appeared A. W. Appel, Attorney-in-Fact of the Northwest Casualty Company a Washington corporation, to me personally known to be the individual and officer described

in and who executed the within instrument, and he acknowledged the same, and being by me duly sworn, deposes and says that he is the said officer of the Company aforesaid, and the seal affixed to the within instrument is the corporate seal of said Company, and that the said corporate seal and his signature as such officer were duly affixed and subscribed to the said instrument by the authority and direction of the said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the City of Los Angeles County of Los Angeles, the day and year first above written.

MARVA WEEDE

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires February 3, 1946 [26]

[Endorsed]: Filed Aug. 6, 1943 [27]

[Title of District Court and Cause.]

STIPULATION AND ORDER

It Is Hereby Stipulated by and between the parties hereto, and their respective attorneys, as follows:

(1) That the defendant and appellant may have up to and including the 20th day of September, 1943 within which to file his Assignment of Errors on Appeal;

(2) That the defendant and appellant may have up to and including the 6th day of October,

1943, within which to serve and lodge his Bill of Exceptions on Appeal;

(3) That the plaintiff may have up to and including the 16th day of October, 1943, within which to propose amendments to said proposed Bill of Exceptions; and

(4) That the defendant and appellant may have up to and including the 21st day of October, 1943, for the settlement and filing of said Bill of Exceptions.

Dated this 7th day of September, 1943

CHARLES H. CARR

Attorney for Plaintiff

AMES PETERSON

Attorney for Defendant

It Is So Ordered.

PAUL J. McCORMICK

Judge of the District Court

[Endorsed]: Filed Sept. 7, 1943. [28]

[Title of District Court and Cause.]

PRAECIPE

To the Clerk of the District Court of the United States, in and for the Southern District of California, Central Division:

Sir:

Please prepare the transcript of the record on appeal in the above entitled cause consisting of the following documents:

1. Indictment;
2. Arraignment and Plea;
3. Petition to suppress evidence and return same;
4. Ruling on Petition to suppress evidence;
5. Verdict;
6. Judgment and Commitment;
7. Notice of Appeal;
8. Order fixing bond on appeal; [29]
9. Appeal bond;
10. Stipulations and Orders extending time to file Assignment of Errors, and to settle Bill of Exceptions;
11. Assignment of Errors;
12. Bill of Exceptions;
13. Praecipe.

AMES PETERSON

WILLIAM B. BEIRNE

Attorneys for Defendant and
Appellant.

[Endorsed]: Filed Nov. 12, 1943 [30]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 30 inclusive contain full,

true and correct copies of: Indictment; Minute Order Entered June 21, 1943; Petition to Suppress Evidence and to Direct the Return thereof to the Defendant; Minute Orders Entered July 13, 1943, July 14, 1943, July 15, 1943, July 16, 1943 and August 6, 1943 respectively; Judgment and Commitment; Notice of Appeal; Bail Bond on Appeal; Stipulation and Order and Praecipe which, together with Original Bill of Exceptions and Assignment of Errors transmitted herewith, constitute the record on appeal to the Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for comparing, correcting and certifying the foregoing record amount to \$8.90 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 29 day of November, 1943.

EDMUND L. SMITH, Clerk

(Seal)

By THEODORE HOCKE

Deputy Clerk

In the United States Circuit Court of Appeals
for the Ninth Circuit
No. 10519

N. WINSTON HENDERSON,

Appellant.

v.

UNITED STATES OF AMERICA,

Appellee.

ORDER EXTENDING TIME TO FILE PRO-
POSED AMENDMENTS TO BILL OF
EXCEPTIONS

Good cause appearing therefor,

It Is Ordered that the time within which the Appellee may file proposed amendments to the bill of exceptions in the above-entitled cause be enlarged to and including November 1, 1943; that the Court may have to November 15, 1943, within which to settle the same.

Dated: October 20, 1943.

CURTIS D. WILBUR

CLIFTON MATHEWS

ALBERT LEE STEPHENS.

United States Circuit Judges

A True Copy,

Attest, Oct. 20, 1943,

PAUL P. O'BRIEN

(Seal)

Clerk.

[Endorsed]: Filed Oct. 20, 1943; Paul P. O'Brien, Clerk,

[Endorsed]: Filed Oct. 21, 1943, Edmund L. Smith Clerk By Irwin Hames, Deputy Clerk.

In the District Court of the United States in and
for the Southern District of California Central Division

No. 16044—Criminal

UNITED STATES OF AMERICA

Plaintiff,

—vs.—

NATHANIEL WINSTON HENDERSON,

Defendant.

BILL OF EXCEPTIONS

GRACE SOUTHWORTH KINGON

called as a first Government witness testified as follows:

I am the clerk at the rationing board No. 5-48, which is located at 1979 S. Vermont Ave., Los Angeles. I have been working at that place continuously during the past year, and I know the defendant Mr. Henderson. He became Chairman of the War Rationing Board here in August, 1942. I recognize the document which you hand me (Government's Exhibit "1") it is an office memorandum and directs that coupons from mileage rationing books be burned at the close of business each day. I recognize the handwriting of Mr. Henderson on the bottom of this memorandum, which handwriting is as follows: "No incinerator available in neighborhood." (Tr. P. 16). Mr. Henderson used to spend about eight hours a day

(Testimony of Grace Southworth Kingon.)

at the rationing board, and he was there about 5½ days a week. I saw Mr. Henderson in the general room at the rationing board daily.

Q. By Mr. Norcop: I will ask you if you can state what was done with these gasoline ration coupons there in the gasoline section when they were tailored out of the books?

Mr. Cannon: To which we object on the ground that it has no value at all in this case; it is immaterial; it would not prove or tend to prove any issue in this case, matter of custom not being in issue.

The Court: What is the purpose of this, Mr. Norcop?

Mr. Norcop: If the Court please, under the first count of the indictment we accuse the defendant of embezzlement. And as I understand, embezzlement is like in a bank, you have a right to prove the transactions that go on in the bank, if you are accusing the bank cashier of embezzlement. Among other things you have to show his access to the books what his duties were, and what was done. And you have to prove every element of embezzlement in that fashion. You can't prove it by anything except what happened on the spot from time to time.

Mr. Peterson: Ordinarily I know the Court would not want to [1*] hear from both counsel. I want to make this observation, in addition to

*Page numbering appearing at foot of page of original Bill of Exceptions.

(Testimony of Grace Southworth Kingon.)

what Mr. Cannon says, in answer to what Mr. Norcop advanced. This indictment charges a specific act upon a specific date with reference to a specific number of coupons. That is what we are here to meet; that is what we are charged with. The testimony from this employee of that board as to what was the custom upon other days has nothing to do with the charge that we are here very specifically required to meet. I object to it for that reason.

The Court: The objection is overruled. You may answer.

Mr. Peterson; Note an exception, please.

The Witness: Each person who is tailoring books puts the coupons that they took from the books in a box on their desk. At the end of the day they were gathered up either by Mr. Henderson (the defendant) or the chief clerk, and burned. Up to a certain time under instructions from the OPA the Chairman of the Board would burn them. (Tr. p. 20). They were put into a paper sack, like an ordinary grocer's sack, and Mr. Henderson would take the sack away with him. The coupons were put into paper sacks and given to Mr. Henderson. I never saw Mr. Henderson burn any paper sacks with gas rationing coupons in them. I saw Mr. Henderson at the Board about 2:00 o'clock in the afternoon. I think on the 24th of May. (Tr. p. 28) He came in and said, "Hello everybody." We visited around and I went back to my desk and to my work, and Mr.

(Testimony of Grace Southworth Kingon.)

Henderson went up to the front door and talked to the customers as they came in, and inquired what they wanted and tried to help them the rest of the day. I would say he was there (Tr. p. 30) until about 6:00 o'clock, and then he came back to work during the evening, and it became time to gather up the books and put them in the bank, and Mr. Henderson said that the books were not to be put away; that they were going to write books that evening and issue books, so the books were left out. I think they only wrote "A", "B" and "C" books that night. Mr. Tinley did not return the books to the bank that day. On that particular evening (Tr. p. 37) there were other persons present on [2] the premises occupied by the Board. Whereupon the following occurred:

Q. By Mr. Norcop: How late did you work that day?

Mr. Peterson: I object to that on the ground it is not material. It is not shown the defendant was there.

Mr. Norcop: Now, I am going to come——

The Court: It is overruled. You may answer.

Mr. Peterson; Note an exception.

The Court: You may answer it, Mrs. Kingon.

The Witness: May I have it again, please?

The Court: Read the question please, Mr. Bargion.

(Question read by the Reporter)

A. Until around 6:30.

(Testimony of Grace Southworth Kingon.)

Q. By Mr. Norcop: Do you know of your own knowledge whether the office was open that evening for tailoring books?

A. It was open that evening.

Mr. Norcop: May I be pardoned just a moment now, your Honor?

The Court: That is all right.

(Witness addressing the Court)

The Court: Did you get the statement of the witness?

The Reporter: No, I did not, your Honor.

The Court: The witness turned to the Court and said, "I am sorry, your Honor." and it is now in the record. Many witnesses make the same mistake, Mrs. Kingon.

Q. By Mr. Norcop: Directing your attention, Mrs. Kingon, did any conversation occur at any time between you and Mr. Henderson or Mr. Henderson and someone else in your presence, concerning any missing gasoline books at that Board?

A. No.

Q. Do you recall any discussion as to any hiatus in the records between another Board member and Mr. Henderson that was discussed by him in your presence as to one book? [3]

Mr. Peterson: That is objected to upon the ground it is not within any issue of this indictment. The witness has already precluded further inquiry by answering that there was no conversation, in the previous answer.

(Testimony of Grace Southworth Kingon.)

Mr. Norcop: We have a right to direct the witness, I think, if I may be so bold as to suggest, to direct her attention to a subject, because I know what I have in mind.

Mr. Peterson: I just want my objection to be very clearly in the record, that I am objecting for the reason it is not within the issue raised in either count of the indictment.

The Court: The objection is overruled.

Mr. Peterson: And an exception noted.

Mr. Norcop: Mr. Reporter, will you re-read the question now, please the last question?

(Question read by the Reporter)

A. No; I don't.

The Witness Recalled for Further Direct
Examination

Br. Norcop: Q. I asked you yesterday afternoon if you had a conversation with Mr. Henderson regarding a "C" gasoline book, and your answer was in the negative. A. Yes.

FRED E. YERGER

called as a witness on behalf of the Government testified as follows:

I am Boards Operation officer, office of Price Administration, in Los Angeles. The document which you show me (Government's Exhibit "3") is a record out of the Ration Board, and which

(Testimony of Fred E. Yerger.)

is used in its daily work (Tr. p. 52). This document shows part of the duties of the Chairman of the War Ration Board [4]

Cross Examination

By Mr. Cannon:

A. The document which you now show me, dated August 28, 1942, was signed by me and transmitted to Mr. Henderson. This document was received in evidence and marked defendant's Exhibit "A" and is as follows:

"Dear Mr. Henderson:

"At the request of the Administrator, Office of Price Administration, Washington, D. C. pursuant to the recommendation of the Defense Council Organization in your State, you are appointed as Chairman of the War Price and Rationing Board No. 5-48 State of Calif. without compensation for an indefinite period. During this period your services will be without compensation or reimbursement for travel or other expenses from the United States. Kindly retain this letter as evidence of your appointment, and sign the enclosed statement of acceptance which should be returned promptly to this office. This action is necessary for official completion of your appointment.

(Testimony of Fred E. Yerger.)

“We appreciate your patriotic cooperation in this very important work.

“Yours very truly,

“FRED E. YERGER,

“State Organization Officer.”

It is a fact that we did have robberies committed at different War Ration Boards. I cannot say (Tr. p. 61) whether or not a large number of “A” coupon books were stolen. I will state (Tr. p. 65) that I did see a notation by Mr. Henderson to the effect that no incinerators were available in the neighborhood in which to burn coupons, and I will state that I did not do anything about this, [5] although it is true that I instructed Mr. Henderson to burn them. But I did not take into consideration the fact that there was an ordinance in The City of Los Angeles prohibiting the burning of anything after 4 p.m. Nevertheless, the instructions for the burning of coupons at the end of each business day came out of my office. (Tr. p. 66). Our auditing staff never functioned (Tr. p. 77) after Mr. Henderson was arrested. I audited that Board, but I can not tell you whether or not the books were in good order. Whereupon Mr. Norcop made the following statement to the Court:

By Mr. Norcop:

Now, we are going to prove through this case several other embezzlements, or we are going to offer to prove several other cases of embezzlement, and in the one I am bringing up now the facts cen-

(Testimony of Fred E. Yerger.)

ter around the date, the earliest date on this form is January 22, 1943, that would be five months prior to the date alleged in the indictment, and that is the issue we put to the Court; we think we are entitled to prove other embezzlements as tending to show criminal intent. They don't of course, prove the guilt or innocence of the defendant on the specific charge named in the indictment. That is the issue we submit and we ask the Court to consider our request to so rule.

The Court: What is your position regarding the theft?

Read the last statement of Mr. Norcop, please, Mr. Goldstein.

(The record was read.)

The Court: Now read my statement.

(The record was read.)

The Court: What is the point you have in mind that you want to prove by showing the similar offenses?

Mr. Norcop: I think we have established and completed the necessary testimony to show that Mr. Henderson was first a member of the War Ration Board, and throughout all this period he was chairman of this War Ration Board, and his instructions and duties [6] are enumerated in these exhibits that we have here, and what they were supposed to do with tailored coupons; that is, burn them and destroy them.

In the light of Zerbst, if your Honor wants me

(Testimony of Fred E. Yerger.)

to take time to go into that—here is what those cases hold: That if the culprit conceived the idea to steal while the things were lawfully in his control and under his custody, it is embezzlement. If he took them away from the place where they were lawfully, legally, and had a right, say, to take them out to his home, if it could be construed in the course of his duties, or, we will say, the looseness of these regulations, and counsel mentioned about not burning after 9:00 o'clock in the morning, a city ordinance, assume, then, it would be perfectly proper for him to transport those sacks out to his home for the purpose of burning them the next morning before 9:00 o'clock, then, I suppose, constructively he is still in legal possession of documents, and if he conceives the idea at his home to steal them, misappropriate them, put them in his own pocket, then sell them to somebody, that that would be embezzlement. And the fact that he did it once in January, the fact that he did it again, we will say, in April, and the fact that he did it several times in May, and we prove, as we expect to, on June 2nd, would enable the jury to see what was his line of conduct, and whether he did this innocently by accident or mistake or frame-up, so to speak, or whether it is reasonable to suppose that the man did it repeatedly while he was chairman of that board would do it on June 2nd. And I think a safe instruction could be given to the jury to limit it for that sole purpose.

Do I make myself clear?

(Testimony of Fred E. Yerger.)

The Court: I believe that you have. You intend to show commission of other offenses for the purpose of proving intent in the commission of the offense which is charged in the indictment?

Mr. Norcop: Yes, your Honor. And I can argue further, [7] but I don't know how much your Honor wants.

The Court: The Court is familiar with the general principle that where there is a scheme to defraud, that evidence of other offenses that are of like nature may be shown; that such evidence may be received as bearing upon the question of intent. But there also is a line of demarcation stated in some of the cases upon the question of intent; that there may be some cases where it isn't necessary to show the element of intent as to a particular thing. Now, there may be cases where the question arises whether it was done through mistake or accident or inadvertence, or without any wrongful motive. Then, of course, it becomes necessary to show intent and to offer proof for that purpose.

Certainly, in such situation the proof of other offenses may be shown. That is the general principle.

I am just wondering whether the case is in such status at the present time that you definitely are in a position to offer such proof now.

Mr. Norcop: May I interrupt your Honor to suggest this? We feel that the Government must prove specific criminal intent after the evidence is all in to be entitled to a conviction under the em-

bezzlement count. We, likewise, feel we must prove specific intent under the second count of stealing and purloining.

JAMES P. MURRAY,

called as a witness on behalf of the Government testified as follows: (Tr. p. 94)

At the time when I saw Mr. Henderson at 1979 S. Vermont Ave., I was a whiskey salesman, and I went out to get my "C" book. I had a conversation with him (Tr. p. 96).

By Mr. Norcop:

Q. Tell the jury what was said and done by——

Mr. Cannon: Objected to as immaterial, having no issue in the case, too remote. [8]

The Court: It is overruled.

Mr. Cannon: Exception.

The Witness (continuing): I told Mr. Henderson that I had an "A" book and I was applying for my "C" book in order to get enough gasoline to run both jobs that I was working at, and I asked Mr. Henderson if I could get some coupons, enough to run me on until I could get my "C" book. He had a paper sack down there at the end of the desk and he reached in and gave me a few coupons and said, "I think this will run you until you can get the book through." I again talked to Mr. Henderson a couple of days later when I went back to get my "C" book. I just got my book and went on out. Later when I ran out of extra tick-

(Testimony of James P. Murray.)

ets I went back and asked him if I could get some more, and I had a conversation with Mr. Henderson on the sidewalk in front of the rationing board.

Q. Give us the conversation.

Mr. Cannon: If the court please, I object on the ground that it is immaterial and has no bearing on the issues in this case, and particularly on the ground that it is too remote.

The Court: Overruled.

Mr. Cannon: Exception. If the Court please, without having to interrupt each time on these various conversations, may it be understood without my making specific objections to each portion of the testimony of the witness having to do with this conversation, that I have a running objection to the entire conversation.

The Court: "As far as this conversation is concerned, it is satisfactory to the court, if it is agreeable to Mr. Norcop."

Mr. Norcop: That is agreeable, your Honor.

The Court: Very well.

Mr. Peterson: The same exception taken or noted as though verbally stated.

The Court: That is understood.

Mr. Norcop: So stipulated. [9]

The Witness: I asked Mr. Henderson at that time if I could get any more tickets, that I was about to run out, and I wanted some more to make a trip up to Bakersfield, and he says, "I will give you a few more." He said, "If you go out there in my car, it is parked on a lot, there are

(Testimony of James P. Murray.)

some folded up in a newspaper, and they are sticking on the inside of the door handle on the left hand side there where the steering wheel is." And I went out. I said, "Which car is it?" And he pointed it out, and I went out there and found this newspaper and some tickets inside the newspaper, that is, separate tickets, they wasn't all in sheets, just torn up.

Q. By Mr. Norcop: What do you mean by tickets?

A. I mean coupons, gas rationing coupons, "C" coupons.

Q. Did you take them? A. Yes, sir.

Q. When did you next have a conversation with Mr. Henderson concerning gas coupons?

A. As well as I recall that was the 30th, around close to the 30th of January, 1943.

Q. Where? A. Over at the ration board.

Q. Who was present that heard the conversation?

A. There wasn't anybody present then; we were discussing the coupons.

Q. Were you inside the ration board?

A. No; we were on the outside on the sidewalk, and Mr. Henderson and I were discussing getting him some Calvert whiskey.

Q. Tell us everything that was said and done.

A. He asked me if I could get him some Calvert whiskey——

Mr. Cannon: Just a minute. I object on the

(Testimony of James P. Murray.)

ground it has no bearing on the issue in the case, immaterial, and too remote.

The Court: Overruled.

Mr. Cannon: Exception. May I have a running objection to [10] this conversation, and may it be deemed to be overruled and an exception taken?

The Court: It is agreeable to the Court.

Mr. Norcop: So stipulated.

The Witness: What am I supposed to do now?

The Court: Read the question, please, Mr. Goldstein.

(The question and answer were read.)

The Witness: I told him we didn't handle Calvert, we handled 'Seagram, and the companies wouldn't let us handle both kinds, and I couldn't get him any Calvert.

Q. By Mr. Norcop: What did he say?

A. At that particular time? He told me *that* that I couldn't get any more tickets without a cost to me. He said friendship would go a long way, but we just can't continue this. He said, "If you could sell some tickets I think I would be able to get you some." I said, "What do you ask for them? How much do I have to get for them? I never have tried to sell any."

Q. That is what you said to him?

A. Yes, sir. And he said I can sell them for \$20 a thousand. That is, I would have to pay him that for them. And all over the \$20 I got out of it, it was up to me to keep.

Q. That is what he said?

A. Yes, sir.

(Testimony of James P. Murray.)

Q. Then what happened?

A. I went back to the board a few days later than that; he left me some tickets at that time.

The Court: What tickets do you mean?

The Witness: Coupons, I mean C coupons. I keep calling them tickets, but I mean C coupons, that is what I was handling.

Q. By Mr. Norcop: All right.

A. And I went back to the board—let's see—this was——

The Court: When you say you went back to the board—— [11]

The Witness: Rationing board over at 1979 South Vermont. This was in the latter part of January I am speaking about right now——

The Court: Can you hear the answers?

Mr. Peterson: No.

The Court: Read the statement of the witness.

(The record was read.)

Q. By Mr. Norcop: You were going to direct me to a conversation or a meeting that you had with Mr. Henderson subsequent to that date?

A. Yes, when I got the first——

Q. The approximate time, fix it any way you want.

A. Well, the ones he gave me then ran me up until February, with the coupons that I had in my book, they ran me up until around February.

Q. All right.

A. Then along about the first of March I asked

(Testimony of James P. Murray.)

him for some more tickets, and then he gave me the thousand gallons of tickets.

Q. Where were you, then, on this date, this occasion on the first of March?

The Court: Can you just as well say "coupons" if you mean coupons?

The Witness: I will try to remember that, your Honor. That is what I mean, coupons, gas coupons.

The Witness: (continuing) About the 1st of March I called Mr. Henderson and told him I thought I could sell one thousand. I called him up at his home. I recognized his voice (Tr. p. 106).

Mr. Cannon: I object to the conversation on the ground that it is immaterial and has no bearing on the issues in this case; does not tend to prove any issue in this case.

The Court: It is overruled.

Mr. Cannon: Exception.

The Witness: Well, I called him and told him I thought I [12] could sell one thousand gallons of C coupons that he asked me about. And he asked me where I was and I told him to meet me on the corner of Hoover and 36th Street, and in about 20 minutes he came down alone. He walked up East on 36th Street and he had a newspaper in his hand and let the newspaper down on the telegraph post and told me to go over there and pick it up, and I went over and picked it up and there was 250 "C" coupons in this paper. And I told him that the man was waiting out there at the gas station

(Testimony of James P. Murray.)

and I would be over to the rationing board and give it to him as soon as I could contact this man. And he said, "Well, call when you get over there." And I went over there as soon as I made the delivery of the tickets. I sold them to Mr. Hubler for \$40.00. I called Mr. Henderson at the rationing board (Tr. p. 108) and talked to him over the telephone. I recognized his voice and I said, "Come over to the lot there."

Mr. Cannon: I object to the question on the ground that it is immaterial, that it has no bearing on the issues in this case.

The Court: Overruled.

Mr. Cannon: Exception.

The Witness: (Continuing) I went over to the lot and sat down in his car and he came over in a few minutes and I gave him \$20.00.

By Mr. Norcop:

Q. Did you have any further conversation over there in his car?

Mr. Cannon: May my same objection go that it is immaterial, has no bearing on the issues in this case?

The Court: It may be so considered. Is this offered for the purpose of intent, showing these other matters, Mr. Norcop?

Mr. Norcop: Yes. For the purpose of showing intent.

Mr. Cannon: It is understood too that it has been offered and received over my objection, and

(Testimony of James P. Murray.)

an adverse ruling by the Court and an exception to that ruling. [13]

The Court: That is true.

By Mr. Norcop:

Q. Mr. Murray, had you finished relating the conversation? A. No, sir, I hadn't.

Mr. Norcop: Have you got your objection in that you wanted Mr. Cannon?

Mr. Cannon: Yes.

The defendant said that in the future whenever we contacted each other, it should not be done around the Board. He said, "When you call, if you want "A" tickets, call for Ancient Age Whiskey, and "B" tickets would be Brown Foreman, and "C" tickets would be Calverts." And if I was to want one thousand coupons I would ask for 1 case of whiskey. I saw him practically every week. The next time I believe was March 16th.

Mr. Norcop: State the conversation.

Mr. Cannon: Objected to on the ground that it has no bearing on the issues in this case.

The Court: Overruled.

Mr. Cannon: Exception.

By Mr. Norcop:

Q. Just tell us what was said and done as near as you can remember.

Mr. Peterson: To this we have the same objection, as heretofore stated.

The Court: It is overruled and an exception is noted.

(Testimony of James P. Murray.)

A. I told him I would like to have a refrigerator and he said "Why don't you write to Washington for it. If it is approved, I will sell you mine and then you can take the new one." I said O.K.

Mr. Peterson: I move to strike that out, if the Court please, all the conversation given about the refrigerator.

The Court: The Court has ruled to proceed.

A. I had a telephone conversation with him before I met him [14] at Jefferson and Crenshaw.

Q. What was the subject of the telephone conversation?

Mr. Cannon: Objected to on the ground that it is immaterial and has no bearing on the issues in this case.

The Court: Overruled.

Mr. Cannon: Exception.

The Witness: (Continuing) I told him I needed a case of Calverts and he said O.K. So we met at Jefferson and Crenshaw after the 'phone call.

Mr. Peterson: As to that conversation, the same objection heretofore made.

The Court: The same ruling.

Mr. Peterson: Save an exception.

A. I asked him to get me a "C" book. There was no money passed at that time. The book that you show me looks like the one that was in the can. (This was marked for identification.) I again saw him just a couple of days before I was arrested, and he gave me a little white box with three

(Testimony of James P. Murray.)

thousand "T" coupons and two thousand gallons of "C" coupons.

By Mr. Norcop:

Q. Tell the jury all that you said and all that he said and all that was done there.

Mr. Cannon: Objected to on the ground that it has no bearing on the issues of the case, and it is incompetent.

The Court: Overruled.

Mr. Cannon: Exception.

A. He told me he was going on a fishing trip and would leave me some coupons for sale, in the event I needed them. And on the envelope which you show me, he drew a map showing how I could get up to Lake Arrowhead.

Mr. Norcop: We offer that in evidence.

Mr. Cannon: Objected to as not bearing upon any issue in the case. [15]

The Court: Overruled.

Mr. Peterson: An exception.

Mr. Norcop: Did you have a telephone conversation with Mr. Henderson after that?

A. I did. After I was arrested. Witness (Continuing) I called him from the OPA office and present with me were three OPA investigators. That was on June 2nd. I asked him how his fishing trip was and he said O. K. I said I would like to have a case of Ancient Age and also half a case of Brown Foreman. He said he wouldn't have any Brown Foreman and I said I would substitute An-

(Testimony of James P. Murray.)

cient Age for it. I asked him where I should meet him and he said in front of his apartment building, Kenwood Arms Apartments on Kenwood and West Adams. So the three investigators and myself went out there (Tr. p. 130). Just before we got to the building the investigator searched me and I did not have any coupons on me then. I had thirty dollars; a \$20.00 bill and a \$10.00 bill, and they took the numbers off of these bills for identification. When I got to the apartment house I saw Mr. Henderson. He met me in front of it. The first thing I did I gave him the \$30.00, which he put in his pocket and he gave me a bunch of coupons which I put in my pocket, and then I took out my handkerchief and blew my nose, because that was to be the signal that I had given him the money. He said, "In the future any coupons that you get will be torn up. You won't get any more in sheets. I will put them in an envelope for you" and I said O. K., and then the officers came up and arrested us both. When Mr. Foster, one of the officers, walked up to us (Tr. p. 136) he said, "What's going on here?" And Henderson said, "I am talking to a friend of mine," and Foster says, "No you are not; I saw the whole transaction." Then he placed Mr. Henderson under arrest and reached in his pocket and got the \$10.00 and the \$20.00 bill.

Mr. Cannon: At this time I move to strike the testimony on the grounds heretofore stated in the written motion which we have [16] filed, that it

(Testimony of James P. Murray.)

was an unlawful search and an unlawful arrest, and I move to strike the testimony.

The Court: The motion is denied.

Mr. Cannon: An exception.

Mr. Norcop: We offer the two bills as one exhibit.

Mr. Peterson: We object to the introduction in evidence of the bills on the same grounds heretofore made relative to the unlawful search.

The Court: Overruled.

Mr. Peterson: An exception.

(Whereupon the bills referred to were received in evidence as Government's Exhibit 9.)

Mr. Norcop: I offer a package of gasoline coupons, to which the witness has just referred in his testimony.

Mr. Peterson: Same objection.

The Court: Overruled.

Mr. Peterson: An exception.

(Whereupon the gasoline coupons referred to were received in evidence as Government's Exhibit 10.)

The Witness: (Continuing) Just then Mr. Henderson ran his hand in his pocket and pulled out a purse and said, "If it's money that you want, I have plenty of it." He had a purse pretty well filled with bills and papers. Mr. Foster said, "I have got all I want."

(Testimony of James P. Murray.)

By Mr. Norcop:

Q. I now show you a little paste-board box and ask you if that is the box you had referred to in your testimony before the lunch hour.

A. It is the one that Mr. Henderson gave me just before going to Arrowhead.

Mr. Norcop: We offer this package in evidence with its contents.

Mr. Peterson: It is objected to on the ground that it is no part of the transaction for which the defendant is on trial. It is too remote and has no bearing on the issues set forth in the indictment. [17]

The Court: Overruled.

Mr. Peterson: An exception.

(Whereupon package and contents referred to were received in evidence as Government's Exhibit 11.)

The Witness: (Continuing) Just before going to Lake Arrowhead Henderson told me that inasmuch as he was getting no compensation for his work at the Board, he felt he should be reimbursed in some manner.

Cross Examination

By Mr. Peterson:

The Witness: (Continuing) When I first met Mr. Henderson I was a liquor salesman. Many times when I saw Mr. Henderson on Vermont Ave., he would be out in front of the rationing board directing members of the public to the various

(Testimony of James P. Murray.)

clerks who worked there. I did have some conversation with Mr. Henderson about getting some Nylon hose in North Carolina. I had been arrested before Mr. Henderson was arrested. After I was arrested I was released the next day on \$250.00 bond and talked to the officers several times afterwards concerning Mr. Henderson. I was only arrested on a misdemeanor charge and I have not yet been sentenced. And I knew when I was arrested that I could get one year in jail and a \$10,000.00 fine. I telephoned Mr. Henderson before his arrest.

By Mr. Peterson:

Q. From where did you telephone?

A. O.P.A. office.

Q. Here in Los Angeles? A. Yes, sir.

Q. And who was about you there?

A. Mr. Foster, Mr. Taylor and Mr. Smith.

Q. When you talked to Mr. Henderson you did not tell him, naturally, that those three gentlemen were there, did you? A. No, sir.

Q. And you did not tell him that shortly he was to be visited [18] by you and those three gentlemen? A. I did not.

Q. And this little handkerchief business that you had, that was a prearranged signal, was it?

A. That is right.

Q. Which was known only to you and the officers, but not known to Mr. Henderson?

A. That is right.

(Testimony of James P. Murray.)

Q. You didn't, I take it, make any opposition to the O.P.A. agents when they searched you, did you?

A. No, sir. Neither did Mr. Henderson.

Q. And you did not say, "Please don't do this," or anything of that sort?

A. Neither one of us did.

Q. Because you knew exactly what was going to take place, didn't you?

A. I knew that they were going to search us; yes, sir.

Q. And you knew exactly what those men were intending to do when they came up with you?

A. I knew if they saw the transaction—I presumed there would be an arrest. I didn't know; I just presumed it.

Q. You presumed that when you left the O.P.A. headquarters, didn't you?

A. That is right.

Q. And you came in two cars, as I take it?

A. That is right.

Q. And each car had the same destination?

A. That is right.

The Witness (Continuing) It is true that I hope that I am not going to be sent to jail.

By Mr. Peterson:

Q. Your bond has not been raised since your plea of guilty, has it? [19]

Mr. Norcop: Objected to as incompetent.

The Court: The objection is sustained.

Mr. Peterson: Note an exception.

The Witness (Continuing) Before giving Mr.

(Testimony of James P. Murray.)

Henderson the \$30.00 I discussed it with the officers in their office. One of the Government men suggested my calling Mr. Henderson on the phone the day he was arrested.

MARSHALL EASTON McFARLAND,

called as a Government witness testified as follows:

I made an application for additional mileage at the South Vermont Avenue address. I filed that with the ration board.

By Mr. Norcop:

Q. Did you or did you not have issued to you by the ration board more than one "C" book?

Mr. Cannon: I object on the ground that it is immaterial, having no bearing on the issues of the case. It would not prove or tend to prove anything.

The Court: Overruled

Mr. Cannon: Exception.

The Witness: (Continuing) There were coupons in the book when I returned it, the difference between the number that I used and the number that were issued to me. I did not use over five.

RICHARD W. SMITH,

called as a Government witness testified as follows:

I am an investigator from the Office of Price Ad-

(Testimony of Richard W. Smith.)

ministration, and I saw the defendant, Henderson, on June 2, 1943, near Kenwood and Adams. I saw Mr. Murray with him. I saw them greet each other. It looked like they were shaking hands. I crossed the street over to where they were. Mr. Foster and Mr. Taylor were right ahead of [20] me. (Tr. p. 205.) Mr. Foster put his hand in the left hand pocket of Mr. Henderson and took out of his pocket a \$10.00 and a \$20.00 bill, and he then removed a package of "A" gasoline coupons from Mr. Murray's left hand pocket, and then made a search of Mr. Henderson's automobile, but he did not take anything from it. We took the serial numbers from the two bills on the morning of the 2nd of June, before we saw Mr. Henderson. I did not see money pass between Henderson and Murray and I did not see the coupons passed between the men.

JONA H. TAYLOR

called as a Government witness testified as follows:

I am legal investigator for the Office of Price Administration and I saw Mr. Henderson on the morning of June 2nd. Before going out to Henderson's place we searched Murray and kept him in our sight at all times. I saw Murray approaching Mr. Henderson and they shook hands, and a little later Mr. Murray took out his handkerchief and blew his nose, and we walked over to where the two men were standing, and I told Henderson

(Testimony of Jona H. Taylor.)

that he was under arrest. Then Mr. Foster reached in Mr. Henderson's pocket and took the money that had passed from Murray to Henderson, and the two bills that you now show me are the bills he took. I did not see anything pass between the two men that I could identify at the time.

JOHN E. FOSTER,

called as a Government witness testified as follows:

I am an investigator for the Office of Price Administration. I saw the witness Murray at my office on the 2nd day of June of this year. I heard Mr. Murray in my presence, and in my office on South Broadway make a telephone call.

By Mr. Norcop:

Q. Tell the jury what you heard Mr. Murray say? [21]

Mr. Cannon: I object to it as being hearsay, and no proper foundation.

(Whereupon the conversation was not admitted in evidence.)

The Witness: (Continuing) I later in the same day saw Mr. Murray at the Kenwood Arms Apartment on West Adams Boulevard in company with the defendant (Henderson). I told Henderson I was with the Office of Price Administration and told him he was under arrest, and I searched him and found one \$10.00 and one \$20.00 bill which I had punched earlier in the morning to identify

(Testimony of John E. Foster.)

them. And at the same time I took out a bunch of coupons from Murray's pocket. I saw Mr. Henderson in his Cadillac automobile and a man came to the car and said, "Why haven't you been over to see me?" And Henderson said, "I didn't get any fish for you," and the man started away and I called him back and told him to give me his name and address.

Mr. Cannon: I move to strike the last part of that statement as incompetent and immaterial, having no bearing on the issues of this case and as an event subsequent to the arrest and subsequent to the alleged offense.

The Court: Motion is denied.

Mr. Cannon: An exception.

The Witness: (Continuing) The map which you show me is a correct representation of where events I describe took place. I did not have a search warrant at that time, nor did I have a warrant for Henderson's arrest, nor am I a Federal Bureau of Investigation agent, nor a United States Marshal, nor a Deputy Marshal. I am not a City Police Officer, and I am not a County Police officer.

MINNIE SMITH

witness for the Government, testified as follows:

That she was a paid employee of the War Ration Board on South Vermont Ave. I was working at the Board on May 24th of this [22] year, and cou-

(Testimony of Minnie Smith.)

pons were tailored on that evening. The Board was open on May 31st, but no gasoline books were tailored on the evening of that day.

(Whereupon followed a lengthy discussion of points of law between counsel and the Court, which is not included in this Bill.)

Whereupon the Government rested (Tr. p. 325) and counsel for the defendant moved the Court to direct a verdict of Not Guilty as against the defendant on both Counts, which motions were by the Court denied and an exception allowed. (Tr. p. 326)

Whereupon five witnesses were called, to-wit: Murray Armstrong, Sidney Redpath, Kenneth A. MacIntyre, Robert A. Stillwell, and Edward F. Herzog, all of whom testified that they had known the defendant for many years; that his reputation for truth, honesty, and integrity and for being a law-abiding citizen was good. Whereupon (Tr. p. 334) the defendant again moved the court for a directed verdict of acquittal, as the evidence was all closed, which motion was by the Court denied and an exception allowed.

Whereupon the Court instructed the jury as follows:

Gentlemen of the jury, the Court will not proceed to instruct you upon the law applicable to the case, and will attempt to do this as concisely as is reasonably possible considering the nature of the case and the extent of the evidence which has been presented.

By the finding of an indictment no presumption whatsoever arises to indicate that a defendant is guilty, or that he has any connection with, or responsibility for, the act charged against him. A defendant is presumed to be innocent at all stages of the proceedings until the evidence introduced on behalf of the Government shows him to be guilty beyond a reasonable doubt. And this rule applies to every material element of the offense charged. Mere suspicion will not authorize a conviction.

A reasonable doubt is such a doubt as you may have in your [23] minds when, after fairly and impartially considering all of the evidence, you do not feel satisfied to a moral certainty of the defendant's guilt. In order that the evidence submitted shall afford proof beyond a reasonable doubt, it must be such as you would be willing to act upon in the most important and vital matters relating to your own affairs.

Reasonable doubt is not a mere possible or imaginary doubt or a bare conjecture; for it is difficult to prove a thing to an absolute certainty.

You are the sole judges of the credibility and the weight to be given to the witnesses who have testified upon this trial. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testified; by the character of his testimony, or by evidence affecting his character for truth, honesty, and integrity, or his motives; or by contradictory evidence.

In judging the credibility of the witnesses in this case, you may believe the whole or any part of the evidence of any witness, or may disbelieve the whole or any part of the evidence of any witness, or may disbelieve the whole or any part of it, as may be dictated by your judgment as reasonable men.

The opinion of the judge as to the guilt or the innocence of a defendant, if directly or impliedly expressed in these instructions or at any time during the trial, is not binding upon the jury, for to the jury exclusively belongs the duty of determining the facts. The law you must accept from the Court as correctly declared in these instructions. The instructions are to be considered as a whole.

You should carefully scrutinize the testimony given, and in so doing consider all of the circumstances under which any witness has testified, his demeanor, his manner while on the stand, his intelligence, the relations which he bears to the Government or the defendant, the manner in which he might be affected by the verdict [24] and the extent to which he is contradicted or corroborated by other evidence, if at all, and every matter which tends reasonably to shed light upon his credibility.

A conviction may be had on circumstantial evidence alone, where all the circumstances distinctly point to the guilt of the accused and are unexplainable on any other reasonable hypothesis.

A fact in issue may be proved either by direct evidence or by proof of other facts or circumstances from which the fact in issue may be inferred.

In determining what your verdict shall be you are to consider only the evidence before you. Any

testimony as to which an objection was sustained, and any testimony which was ordered stricken out, must be wholly left out of account and disregarded.

If a witness is shown knowingly to have testified falsely on the trial touching any material matter, the jury may distrust his testimony in other particulars, and in that case you are at liberty to reject the whole of the witness's testimony.

The first count of the indictment in this case charges the defendant, N. Winston Henderson, with the violation of Section 100 of Title 18, of the United States Code Annotated, which reads as follows:

“Whoever shall embezzle, steal or purloin any money, property, record, voucher, or valuable things however, of the monies, goods, chattels, records, or property of the United States, shall be . . . ”

punished according to law. The extent of the punishment is not a matter for the jury, but for the Court.

Where one comes lawfully into possession of property and afterwards and while it is in his possession forms and carries out the purpose of appropriating it to his own use, the crime thus committed is the crime of embezzlement.

Embezzlement is the fraudulent appropriation of property by [25] a person to whom it has been entrusted or into whose hands it has lawfully come.

You must weigh and consider the case without any regard to sympathy, prejudice, or passion for or against any party to the action.

You are instructed that any evidence which was admitted bearing on the alleged embezzlement by the defendant of any gasoline ration coupons, other than those mentioned in the indictment, is not to be considered by you for the purpose other than the question of defendant's intent concerning the coupons charged in the indictment as having been embezzled by him.

Before the jury may infer guilty intent from the evidence of another crime of a like nature, such offenses and all the elements thereof must be established by evidence which is plain, clear, and conclusive.

The jury may infer guilty intent from evidence of other crimes of a like nature, if any is shown by the evidence, only if it first believes from other evidence that the act charged by the indictment was done by the plaintiff.

You are instructed that the first count of the indictment charges that on or about the 2nd day of June, 1943, at Los Angeles, California, the defendant knowingly, wilfully, unlawfully, and feloniously embezzled certain property of the United States, described as: 250 "A" gasoline ration coupons, which the defendant knew to be the property of the United States, and which had come into his possession in the regular course of his official duty as chairman of the War Price and Ration Board, No. 5048.

Unless you find beyond a reasonable doubt and to a moral certainty that the defendant committed each one of the acts charged against him in the first

count of the indictment, then it is your duty to acquit the defendant, and if you entertain a reasonable doubt as to whether or not any one element of the defense as set [26] forth in the first count of the indictment is not substantiated by the proof offered by the Government, then it is your duty to acquit the defendant. The defendant is not required to establish his innocence. The Government is required to establish his guilt to a moral certainty and beyond all reasonable doubt.

If you should find that the witness, James P. Murray, was an accomplice and co-conspirator with the defendant in connection with the commission of any unlawful acts, the testimony of the said James P. Murray should be viewed with caution and carefully scrutinized before you would be justified in believing it.

If you are satisfied that prior to the commission of the acts alleged to constitute the crime, that the defendant never conceived any intention of committing the offense of embezzlement as charged in the indictment, but that the officers of the Government incited and by suasion and representations lured him to commit the offense alleged in order to entrap, arrest, and prosecute him therefor, then these facts are fatal to the prosecution and the defendant is entitled to a verdict of not guilty.

You are instructed that if an officer of the law has reason to believe that the law is being violated, he may proceed to ascertain whether those who are thought to be doing so are actually committing it.

If the officers of the Government act in good faith and in the honest belief that the defendant is engaged in unlawful activities of which the offense charged in the indictment is a part and the purpose is not to induce an innocent man to commit a crime, but to secure evidence upon which a guilty man can be brought to justice, the defense of entrapment is without merit.

You are instructed that it is the right and privilege of the defendant either to take the witness stand and testify, or to remain silent and not appear as a witness; and you are further instructed that the burden rests upon the Government to prove all of the material [27] allegations of the indictment beyond a reasonable doubt, and such burden does not rest upon the defendant to prove his innocence, and no inference may be drawn or considered by you by reason of the fact that the defendant has not testified.

To warrant in convicting the defendant, the evidence to your minds must exclude every reasonable hypothesis other than the guilt of the defendant. That is to say, if after an entire consideration and comparison of all of the evidence in the case you can reasonably explain the facts given in evidence on any reasonable ground other than the guilt of the defendant, you should acquit him.

If, upon consideration of the whole case, you are satisfied to a moral certainty, and beyond a reasonable doubt, of the guilt of the defendant, you should so find irrespective of whether such certainty has been produced by direct evidence or by circum-

stantial evidence, or by a combination of both. The law makes no distinction between circumstantial evidence and direct evidence in the degree of proof required for conviction, but only requires that the jury shall be satisfied beyond a reasonable doubt by evidence of either the one character or the other, or both. Of course, if you have a reasonable doubt as to the guilt of the defendant as charged, your verdict must be not guilty.

A verdict requires the unanimous agreement of the jury. Whatever your verdict may be, whether it is guilty or not guilty, it must represent the agreement of all the members of the jury, and must be signed by your foreman.

For your convenience the Court has had prepared a form of verdict which you may take with you when you retire to deliberate.

Mr. Norcop: May I ask on question, your Honor? Did your Honor consider, or was it delivered to you, this?

(Passing document to Court.)

The Court: You are instructed that one of the provisions of Gasoline Ration Order No. 5-C reads as follows: [28]

“All coupon books, bulk coupons, inventory coupons, and other evidences are, and when issued shall remain the property of the Office of Price Administration.”

As the Court has stated, it has had prepared a form of verdict which you may take with you when you retire to deliberate.

Will you swear the officers?

Mr. Cannon: Are we not required, under the rules of the Ninth Circuit Court, to take exception before the jury? I think we are, and I don't want to be in error.

The Court: You may do so.

Mr. Cannon: We except to the instruction last read, having to do with the regulations of the O. P. A., on the ground it is not justified by any evidence in the case; and we take an exception to your Honor's failure to give as submitted the instruction we proposed with respect to the entrapment, and defense, which is embodied in the unnumbered sheet which cites the two cases: *Woowai vs. United States*, and *Sam Yick, vs. United States*.

I merely give those citations to identify the instruction.

The Court: It will be marked as having been refused.

Mr. Cannon: Yes. At this time we respectfully ask your Honor, for the purpose of the record, to instruct the jury to acquit.

The Court: That motion is denied.

Mr. Cannon: Exception.

Mr. Peterson: Just one thing.

(Discussion between counsel.)

Mr. Peterson: Mr. Cannon and I decided that was not important and will not ask your Honor.

The Court: What is that?

Mr. Peterson: It was a matter I had in mind, but we decided to ask you not to instruct.

The Court: Very well. Swear the officer.

AMES PETERSON and

WILLIAM B. BEIRNE

By AMES PETERSON

Attorneys for Defendant and
Appellant [29]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated that the foregoing Bill of Exceptions is correct, and that the same may be settled and allowed by this Court.

AMES PETERSON

WILLIAM B. BEIRNE

Attorneys for Defendant and
Appellant.

CHARLES H. CARR,

United States Attorney

By V. P. LUCAS

Assistant United States
Attorney

This Bill of Exceptions having been duly presented to the Court is hereby allowed and made a part of the record in this case.

Dated this 28th day of October, 1943.

C. E. BEAUMONT,

United States District Judge

Received Copy of the within Proposed Bill of Exceptions this 5th day of October, 1943.

CHARLES H. CARR,
United States Attorney
By JAMES M. CARTER
Asst. U. S. Attorney

[Endorsed]: Lodged Oct. 5, 1943, Edmund L. Smith, Clerk, by Irwin C. Hames, Deputy Clerk.

[Endorsed]: Filed Oct. 28, 1943, Edmund L. Smith, Clerk, by R. B. Clifton, Deputy Clerk.

[Endorsed]: No. 10519 United States Circuit Court of Appeals for the Ninth Circuit, Nathaniel Winston Henderson, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California Central Division.

Filed November 30, 1943.

PAUL P. O'BRIEN
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the District Court of the United States in and
for the Southern District of California Central
Division

No. 16044—Criminal

UNITED STATES OF AMERICA

Plaintiff

—vs—

NATHANIEL WINSTON HENDERSON,
Defendant.

ASSIGNMENT OF ERRORS

I.

That the Court erred in refusing to direct the jury to bring in a verdict of Not Guilty as to each Count in the Indictment at the close of the Government's case in chief.

II.

That the Court erred in refusing to direct the jury to bring in a verdict of Not Guilty as to each Count in the Indictment at the conclusion of all of the testimony and evidence in the case.

III.

That the Court erred in allowing in evidence testimony concerning offenses other than those set forth in the Indictment upon which the defendant was on trial.

Dated this 17th day of September, 1943.

AMES PETERSON

WILLIAM B. BEIRNE

By WILLIAM B. BEIRNE

Attorneys for Defendant and
Appellant

Received copy of the within Assignment of Errors this 17th day of September, 1943.

CHARLES H. CARR,

U. S. Attorney, for Plaintiff.

[Endorsed]: Filed Sept. 17, 1943, Edmund L. Smith, Clerk. By Irwin C. Hames, Deputy Clerk.

[Endorsed]: Filed Nov. 30, 1943, Paul P. O'Brien, Clerk.